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ANSWER TO PETITION FOR WRIT OF CERTIORARI

The Commonwealth of Pennsylvania, by and through Robert L. VanHoove, District Attorney, Berks County, Pennsylvania, and Grant E. Wesner, Deputy District Attorney for Law, Berks County, Pennsylvania, prays that the Petition for Writ of Certiorari presented by the defendant, Terry T. Mays, be disallowed, said prayer being directed to the United States Court of Appeals, Third Circuit, refusal to grant a certificate of probable cause and refusal for leave to docket out of time, dated March 10, 1972.

CITATIONS OF OPINIONS BELOW

The Opinion of the United States Court of Appeals, Third Circuit, dated March 10, 1972, to C. A. Miscellaneous Record No. 2251, captioned United States of America ex rel. Terry T. Mays, Appellant v. Commonwealth of Pennsylvania (E.D. Pa. Civil No. 71-1503), cited decisions refusing the defendant a certificate of probable cause and leave to docket out of time.

The Supreme Court of Pennsylvania, on April 5, 1971, refused the defendant-petitioner's Petition for Allowance of Appeal from the Judgment of the Superior Court of Pennsylvania. The judgment of the Court of Common Pleas of Berks County, Pennsylvania, to No. 83 September Sessions, 1967, under which the defendant was found guilty of rape, sodomy, indecent assault, assault with intent to ravish and conspiracy, was affirmed by the Superior Court of Pennsylvania to No. 871 and 880 October Term, 1969, that action having been brought against the defendant, Terry T. Mays, and another defendant, Joseph Jude Oliver, the latter now apparently following his separate appeal course.

On or about September 29, 1971, the defendant-petitioner filed his Petition for Writ of Certiorari in the United States District Court, Eastern District of Pennsylvania, which motion was denied and the certificate of probable cause denied. The matter was appealed to the United States Court of Appeals, Third Circuit, as referred to above. The request for certificate for probable cause and leave to docket out of time was also denied; hence, this present petition.

COUNTER-HISTORY OF THE CASE

Defendants were tried jointly and on December 12, 1967 found guilty by a jury of rape, sodomy, indecent assualt, assault with intent to ravish, conspiracy. In addition, Oliver was found guilty of assault and battery on a second bill of indictment. At all critical stages, Mays was represented by Clement J. Cassidy, Esq., and is now represented by John B. Stevens, Jr., Esq. Oliver was represented by Emmanuel H. Dimitriou, Esq. and John B. Stevens, Jr., Esq. represented him regarding certain post-trial matters (including a filing of reasons for a new trial). Oliver presently, however, after being fully advised of his rights, had elected to represent himself and he has rejected the services of the Public Defender.

Rather than review the testimony in detail at this time, the Commonwealth will review the pertinent portions of the testimony as it relates to the questions raised in the arguments on each point. Suffice it to say briefly that the Commonwealth showed by its testimony that the appellants on June 17, 1967 around 8:55 p.m., without invitation, got into Michael Posta's automobile at Hess's Gas Station located on Lancaster Avenue in Reading, Pennsylvania while Michael and the victim, Donna Susan Reed, stopped there for gasoline. Michael and Donna were in the front seat and the appellants asked Michael to give them a ride in town. The four eventually ended up at an abandoned factory near the Schuylkill River. Michael, after getting out of the car, was struck

by Oliver once or twice and he then left the scene in his automobile. The appellants then took Donna into the abandoned factory and at other places along the river in that vicinity and committed the acts charged. Officer Edmonds found Donna between 11:10 p.m. and 11:15 p.m. in the vicinity of the crime.

In addition to the identification of the appellants by Michael Posta and Donna Reed, Kathleen Celmer and Susan Schneck testified that they knew the defendants prior to June 17, 1967 and on that day, at about 8:40 p.m., while they were at Topps Restaurant located across the street from Hess's Gas Station, identified and saw the defendants walking toward the gas station from Moore's Diner.

Defense was one of alibi. The appellants attempted to show through the testimony of their witnesses that at the time of the alleged crime they were at a playground at the Oakbrook Project. In addition, the appellants sought to impeach the credibility of most of the Commonwealth's witnesses.

The points raised by appellants are not the same for each one, but in the interest of fairness, the Commonwealth considers all points raised as equally applicable to both. From the reading of appellants' brief, there does not appear to be any basis for an arrest of judgment. At best, the questions raised relate to grounds for a new trial. Appellants' motions for a new trial, therefore, are now before your Honorable Court for consideration.

REASONS FOR DENYING THE PRAYER OF THE PETITION FOR WRIT OF CERTIORARI

I. Where the victims clearly and positively identified appellants in court and where no motion to strike the in-court identification was made, the in-court identifications were not tainted by an invalid, pre-trial identification.

II. Where no exceptions were taken to the charge, appellants cannot now complain about the court's charge with regard to the credibility of witnesses.

III. The Commonwealth did not suppress evidence to the defendant-petitioner's prejudice and the court did not err in failing to decide what portions of the police report should be turned over to the defense counsel for the purpose of cross-examination.

IV. With regard to the assertion made by the defendant-petitioner concerning the four youths whose testimony he intended to use by way of alibi but which did not suffice for that purpose, there was no error committed in any manner with regard to the court's action concerning their statements or with the method by which their credibility was judged.

V. Where no objections were made, it is not error for the trial judge during the trial, to leave the court room momentarily to go to the retiring room, adjacent to the court room, to get a law book referred to by counsel.

COUNTER-STATEMENT OF THE QUESTIONS INVOLVED

I. Was the defendant-petitioner properly identified?

(Answered in the affirmative.)

II. Was the defendant-petitioner convicted upon admissible, relevant and competent testimony?

(Answered in the affirmative.)

III. In the absence of objection, is it proper for the trial judge, during the trial, to leave the court room momentarily to procure a law book referred to by defendant's counsel?

(Answered in the affirmative.)

ARGUMENT IN SUPPORT OF THE REQUEST FOR THE DENIAL OF THE WRIT OF CERTIORARI

I. Was the Defendant-Petitioner Properly Identified?

Appellant complains that the identification procedure used by the police in showing to the victims, Reed and Posta, pictures only of the defendant prior to the confrontation and conducting the confrontation without a lineup in the absence of counsel was improper. This procedure occurred a few days after the Supreme Court of the United States handed down its decision in *United States v. Wade,* 388 U.S. 218, 18 L. Ed. 2d 1149 (1967); *Gilbert v. California,* 388 U.S. 263, 18 L. Ed. 2d 1178 (1967); and *Stovall v. Denno,* 388 U.S. 293, 18 L. Ed. 2d 1199 (1967). Since these cases control identifications occurring after June 12, 1967 and the identification in this case occurred on June 20, 1967, there is no question but that the principles in these cases would otherwise apply.

It is submitted, however, that these cases do not apply here for the following reasons:

In the first place, the appellants did not object to the identification testimony of either Reed or Posta. Neither did they submit points for charge nor did they specifically object to the charges given by the Court. As such, appellants waived any right they might otherwise have under the pronouncements of *Wade* and *Gilbert.*

Secondly, even if the defendant's failure to object does not constitute a waiver, it does not follow that Reed and Posta's in-court identifications are inadmissible. Both *Wade* and *Gilbert* clearly hold that an in-court identification, at trial, is not rendered inadmissible merely because the witness also had made an invalid, pre-trial identification. An in-court identification is only inadmissible by reason of the constitutionally invalid, pre-trial identification if the in-court identification is the fruit of the prior identification and does not have an independent source.

When is an in-court identification the fruit of a pre-trial identification, and when does the in-court identification emanate from an independent source? In *Wade*, the Court formulate the following list (388 U.S. at 241):

> "We think it follows that the proper test to be applied in these situations is that quoted in Wong Sun v. United States, 371 U.S. 471, 488 'Whether, granting establishment of the prior illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the prior taint'. Maguire, Evidence of Guilt, 221 (1954), see also Hoffa v. United States, 385 U.S. 293, 309. Application of this test in the present context requires consideration of various factors; for example, the prior opportunity to observe the alleged criminal act, the existence of any discrepancy between any pre-lineup description and the defendant's actual description, any identification prior to lineup of another person, the identification by pic-

ture of the defendant on a prior occasion, and the lapse of time between the alleged act and the lineup identification. It is also relevant to consider those facts which, despite the absence of counsel, are disclosed concerning the content of the lineup."

In applying this test to the instant case, it is obvious that Reed's and Posta's identification in Court had an independent source. Both witnesses' opportunity to observe the appellants during the criminal acts were excellent. As to Reed, the defendants were with her for at least a two hour period. And, the appellants at no time showed that the in-court identifications were the fruit of the pre-trial, City Hall, confrontations.

Thirdly, as pointed out by Judge Hess in his Opinion at page 5:

> "The Commonwealth did not seek to introduce from either witness testimony relative to identification at the prior confrontation, the real error in Gilbert. The defendant elicited this information by cross-examination in attempting to attack the credibility of the in-court identification. In spite of thorough and complete cross-examination, the in-court absolute identification of the defendants was in no way weakened."

For the foregoing reasons, it is submitted that Reed and Posta's testimony was relevant, admissible, and free of any "taint" as a result of impermissible police identification.

Argument

II. Was the Defendant-Petitioner Convicted Upon Admissible, Relevant and Competent Testimony?

Kathleen Ann Celmer testified that she saw appellants enter Posta's car at the Hess Gas Station. She admitted that, when first questioned by the police, she did not know them. She explained that, at the time, she did not want to get involved (N.T. 177, 178). Also, she was uncertain she witnessed the incident in June or July, 1967.

The Court's charge on credibility, generally, and the credibility of Celmer's testimony, specifically, was more than adequate (N.T. 227). Apparently, appellants' counsel agreed because neither took exception to it. Since no exceptions were taken, appellants cannot now complain about any alleged inadequacies in the charge: *Commonwealth v. Cheatham,* 429 Pa. 198 (1968).

The trial Judge in his charge stated:

> "She (Reed) says further that she was threatened and that over there, Oliver had his hands around her neck and threatened to kill her before the acts were entered into."

Standing alone, this would indicate that the threat to kill took place before the sexual acts. Reed's testimony, however, indicated that the threat to kill was after the acts were completed. However, the Court later on, in its charge at page 233, stated:

> "She also says after the acts were completed, Oliver put his hands around her neck and said, 'All of us have to go sometime', and she thought then she would be killed."

Argument

Reading the charge as a whole, there can be doubt but that the testimony was made clear to the jury. No objections were taken to the charge and the alleged error was not called to the Court's attention after the charge. In addition, the Court, prior to reviewing the testimony in its charge, told the jury that their recollection of the testimony must control, not his. See *Commonwealth v. Snyder*, 427 Pa. 83 (1967).

Pages 109 through 113 of the record show that one of the defendants' attorneys requested Officer Edmonds' police or offense report. On page 112, it appears that the Commonwealth voluntarily turned over the offense report to defense counsel and defense counsel then cross-examined Edmonds on it. In addition, defense counsel had the opportunity to pursue the matter further by calling Edmonds in their case. Here again, the appellants want to step outside the record when they refer to the Assistant District Attorney saying: "I want to do some cutting of the offense report".

This question was first raised at argument and the Court permitted depositions to be taken on the matter. They were taken from appellant Terry T. Mays and former Assistant District Attorney, John A. Hoffert, Esq., and they have been filed of record. Also, the police report in question, comprising Exhibits Nos. 11 and 12, were ordered to be filed with the record. A review of the depositions and record will clearly indicate that the complete offense report was made available to the defendant and nothing was cut or erased. It is true that Mr. Hoffert referred to cutting something but his testimony indicates that after talking to the police officers he

concluded that everything was pertinent and did comply with the direction of the trial Court and nothing whatsoever was suppressed. More importantly, however, is the fact that after defense counsel received the police report, no further request was made for any additional information and there was no suggestion at that time that something cut from the report should be supplied.

Dr. William R. Malcolm, Reed's treating physician, was called as a witness by the Commonwealth (N.T. 48). After being asked if he had occasion to examine Donna Reed on either June 17 or early June 18, Dr. Malcolm said:

> "The Witness: My examination began by speaking to the patient, aking her what happened. I tried to paraphrase this, and asked the patient if this was correct. It was done in the presence of her mother, and I had them read it and sign it, that this was a correct statement of what she had told me." (N.T. 49)

Hoffert then said:

> "I don't want you to relate to us what she told you. That would be hearsay." (N.T. 49)

Thereafter, Dr. Malcolm made no further reference to Reed's "written statements" and appellants' attorneys, on cross-examination, made no inquiry or reference to it. Oliver now complains that the Commonwealth deliberately suppressed this written statement and, as a consequence, he was denied his right of confrontation.

The answer to this contention is simple: the defense at no time requested the production of this statement.

Probably defense counsel saw the statement and decided it would not benefit their clients. In the interest of justice, however, the Commonwealth made this statement a part of the record (post-trial). Interestingly enough, the defendant in no way suggests that the statement would have benefited him. Nor does he assert any prejudice as a result of its exclusion.

III. In the Absence of Objection, Is It Proper for the Trial Judge, During the Trial, To Leave the Court Room Momentarily To Procure a Law Book Referred to by Defendant's Counsel?

The Commonwealth does not contend that the Judge did not leave the Court room. In fact, the Commonwealth clearly admits that momentarily the Judge left the Court room. It transpired in this manner. There was a dispute on a point of law between the attorney for the Commonwealth and the attorney for the defense. In order to resolve that doubt, the Judge left the Court room, entered the retiring room, immediately adjacent to the Bench, got the State Reports and returned to the Court room. In his Opinion, President Judge Hess states:

> "It would appear that he momentarily left the bench to go to the retiring room adjacent to the Court where the reports of our appellate court decisions are readily available, to procure the case referred to by counsel. Of course, it is now difficult to approximate the time required to procure the report, but having followed the same procedure in other trials,

the trial judge would be safe in concluding that not more than one minute was required for this purpose."

In support of his contention that this momentary leaving the Court room is error, the defendant-petitioner cites the case of *Tunnell v. State,* 24 Okla. CR. 176 (1923). The case is not authority for this purpose, in that the case said that "when the record affirmatively discloses that the trial Judge *lost control of the proceedings by reason of his absence from the bench* during the process of the trial, a judgment of conviction will be reversed." (Emphasis added.) There is not any evidence at all that President Judge Hess "lost control" of the proceedings in any manner.

In addition, even granting arguendo that the Judge's leaving the chamber was objectionable, a proper objection should have been lodged at that time. No appellant should be allowed to allow objectionable material to be entered, take his chances with a favorable verdict by the jury and thereafter complain about the verdict against him. In this regard, see *Commonwealth v. Snyder,* 427 Pa. 83 (1967).

In general aspect, no case is ever tried without some element of error, since a trial reflects the human propensity to err. The question is simply, was there any error basic and fundamental, i.e., that it, in fact, denied the defendant as fair and just a trial as lies within the human province to produce. A review of the record clearly indicates that there is no such error and that there should be no further review of this matter. This case has already been reviewed by the highest Court in the Commonwealth of Pennsylvania. It has been before the

United States Circuit Court of Appeals, Third Circuit. In every instance, the Judges presented with the total record have arrived at an identical conclusion, i.e., that the defendant did in fact receive a trial within the constitutional rights of the 4th, 6th and 14th amendments to the Constitution of the United States. There must sometime be an end to the review of this situation and the Commonwealth respectfully contends that that time is now.

CONCLUSION

The Commonwealth respectfully requests that the defendant-petitioner's Petition for Writ of Certiorari be denied.

Respectfully submitted,
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